TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh
Associate General Counsel for Enforcement

Peter G. Blumberg
Attorney

SUBJECT: Treasurer Policy – Official and Individual Capacities

I. Introduction

The Office of General Counsel recommends that the Commission adopt the attached Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings. The proposed Statement clarifies when treasurers as respondents are subject to Commission action in their official capacity as treasurer and when the Commission will name individual treasurers as respondents in their personal capacity.

A version of the proposed Statement was published in the January 28, 2004 Federal Register. 69 Federal Register 4092 (January 28, 2004). The published document sought comments on all aspects of the draft policy, including whether there are circumstances warranting flexibility in the policy’s application, whether the Commission should consider a treasurer’s “best efforts” to comply with the law, and whether the Commission should apply this proposed policy in matters arising out of the Administrative Fines program. One comment, from Paul E. Sullivan of Foley & Lardner, was received. This memorandum briefly reviews Mr. Sullivan’s comment and recommends that the Commission adopt the attached Treasurer Naming Policy. See Attachment.
II. Discussion of Comment

Mr. Sullivan welcomes the Commission’s effort to clarify its treasurer naming policy and generally supports the proposal. At the same time, he suggests several changes, both on the execution of the policy as well as the process for enacting it, that he believes will assist treasurers to better understand their potential personal liability. While constructive, these suggestions ultimately are unnecessary.

Specifically, Mr. Sullivan suggests that when a treasurer is a respondent in his or her official capacity, a reference only to the position of treasurer without including the treasurer’s name is sufficient. This issue was addressed in the proposed policy statement, where the benefits of including a specific name were enumerated. For example, the practice ensures that an individual is empowered by law to disburse civil penalty payments, make disgorgements or refunds, and carry out other remedies required in conciliation agreements. Also, it is useful to identify the specific individual who, on behalf of the committee, will be served with notices. Ensuring that there is a specific person to respond to inquiries and notices on behalf of the committee also promotes accountability. Finally, it is useful to specify individuals by name in court pleadings to clarify for the district court the relief being sought. Mr. Sullivan also proposes that treasurers named in both a personal and an official capacity receive separate notifications outlining the basis for each finding. The proposed policy statement indicates that the Commission intends to retain flexibility to process matters on a case-by-case basis, and send either separate notifications or, in some instances, joint notifications addressing official-capacity and personal-capacity violations.

Mr. Sullivan also suggests that the policy should affirmatively state that a treasurer found to have violated the law in his or her official capacity is not personally liable for the payment of any civil penalties in the event his or her political committee lacks funds to make such a payment. Mr. Sullivan’s point is already acknowledged in the Policy Statement, where it is noted that in the post-probable cause to believe stage the Commission would be entitled to civil penalties only from the political committees when the treasurer has been named a respondent in an official capacity.

Finally, Mr. Sullivan suggests that a rulemaking on treasurer liability may provide additional notice to the regulated community and suggests that it would be useful for the Commission to identify the “unique provisions” for which a treasurer might be pursued in his or her personal capacity. The proposals regarding when to name a treasurer in his or her personal capacity are based on the plain letter of the statutes and regulations describing treasurer responsibilities and obligations; thus, additional rulemaking would be superfluous. As was pointed out in the draft policy statement, the statute’s use of “treasurers” indicates that Congress intended treasurer responsibility for certain functions, and the statute constitutes notice to treasurers. If Congress had intended that only political committees would be held liable for violations of the Act, it could have easily accomplished this outcome by imposing reporting, recordkeeping, and other duties on “committees” rather than “treasurers.” The Act and its implementing regulations are published and readily accessible to treasurers. Further, the policy
statement describes a number of specific statutes and regulations that place responsibilities on
treasurers, and to that extent, the Commission has further identified unique provisions covered by
the policy. Moreover, the attached Policy Statement itself will be published in the Federal
Register, could be placed on the Commission’s website, could be summarized in the FEC
Record, and could be referenced in FEC brochures. Through this Policy Statement, the
Commission would announce its intentions in certain areas rather than attempting an exhaustive
list of factors it can consider in deciding who to name as a respondent, thereby achieving the goal
of notice while retaining flexibility for the Commission, especially given the expectation that the
naming of treasurers in a personal capacity will occur relatively infrequently.

III. Final Statement of Policy

After reviewing the comment received on the Draft Statement, the Office of General
Counsel has prepared a final Statement of Policy regarding the naming of treasurers as
respondents in enforcement matters. The Office of General Counsel recommends that the
Commission issue this Statement of Policy and implement it immediately.

This Office further recommends that the Statement of Policy be transmitted for
publication in the Federal Register as required by the Freedom of Information Act and submitted
to Congress in accordance with the Congressional Review Act (“CRA”). 5 U.S.C.
§§ 552(a)(1)(D) and 801(a).

This document represents a general statement of policy announcing the general course of
action that the Commission intends to follow. This policy statement does not constitute an
agency regulation requiring notice of proposed rulemaking, opportunities for public participation,
prior publication, and delay in effective date under 5 U.S.C. § 553 of the Administrative
Procedure Act (“APA”). As such, it does not bind the Commission or any member of the general
public. The provisions of the Regulatory Flexibility Act, which apply only when notice and
comment are required by the APA or another statute, are not applicable. Because this non-
binding policy statement is not a “major rule” within the meaning of the CRA and there is no
applicable delay requirement in the Act, the Statement of Policy may be put into effect
immediately upon its publication in the Federal Register.

IV. Recommendation

The Office of the General Counsel recommends that the Commission take the following
actions:

1. Approve the attached Statement of Policy for publication in the Federal Register.

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1 We note that the congressional submission requirements and accompanying delay in effective date specified
in 2 U.S.C. § 438(d)(1) and 26 U.S.C. § 9039(c) apply only to a “separable rule of law” and, in any event, were
2. Direct the Office of General Counsel to transmit the Statement of Policy to Congress in accordance with the Congressional Review Act, 5 U.S.C. § 801 et seq.

Attachment
Draft Final Statement of Policy
FEDERAL ELECTION COMMISSION

11 CFR Part 111

[NOTICE 2004 - ]

STATEMENT OF POLICY REGARDING

TREASURERS SUBJECT TO ENFORCEMENT PROCEEDINGS

AGENCY: Federal Election Commission.

ACTION: Statement of Policy.

SUMMARY: The Commission is issuing a Policy Statement to clarify when, in the course of an enforcement proceeding (known as a Matter Under Review or “MUR”), a treasurer is subject to Commission action in his or her official or personal capacity, or both. Under this policy, when the Commission investigates alleged violations of the Federal Election Campaign Act, as amended, the Presidential Election Campaign Fund Act, and the Presidential Primary Matching Payment Account Act (collectively “the Act” or “FECA”) involving a political committee, the treasurer will typically be subject to Commission action only in his or her official capacity. However, when information indicates that a treasurer has knowingly and willfully violated a provision of the Act or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the Act, or has intentionally deprived himself or herself of the operative facts giving rise to the violation, the Commission will consider the treasurer to have acted in a personal capacity and make findings (and pursue conciliation) accordingly.
This Policy Statement also addresses situations in which treasurers are subject to Commission action in both their official and personal capacities, and situations where successor treasurers are named.

The goal in adopting this policy is to clarify when a treasurer is subject to Commission action in a personal or official capacity, while at the same time preserving the Commission’s ability to obtain an appropriate remedy that will satisfactorily resolve enforcement matters, or to seek relief in court, if necessary, against a live person. Importantly, the policy is grounded in the statutory obligations specifically imposed on treasurers and well-established legal distinctions between official and personal capacity proceedings.


FOR FURTHER INFORMATION CONTACT: Peter G. Blumberg, Attorney, 999 E Street, NW, Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

I. Introduction.

The Commission is modifying its current practices to specify more clearly when a treasurer is subject to a Commission enforcement proceeding in his or her “official” and/or
"personal" capacity. Specifically, when a complaint asserts sufficient allegations to warrant
naming a political committee as a respondent, the committee's current treasurer will also be
named as a respondent in his or her official capacity. In these circumstances, reason-to-
believe and probable cause findings against the committee will also be accompanied by
findings against the current treasurer in his or her official capacity. When the complaint
asserts allegations that involve a past or present treasurer's violation of obligations that the
Act or regulations impose specifically on treasurers, then that treasurer may, in the
circumstances described below, be named in his or her personal capacity, and findings may
be made against the treasurer in that capacity. Thus, in some matters the current treasurer
could be named in both official and personal capacities. Maintaining the Commission's
ability to pursue a treasurer as a respondent in either official or personal capacity allows the
Commission discretion to fashion an appropriate remedy for violations of the Act. ²

Notably, political committees are artificial entities that can act only through their
agents, such as their treasurers, and often can be, by their very nature, ephemeral entities that
may exist for all practical purposes for a limited period, such as during a single election
cycle. Due to these characteristics, identifying a live person who is responsible for
representing the committee in an enforcement action is particularly important. Without a live

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¹ The terms "official capacity" and "representative capacity" are generally interchangeable, as are the terms "personal capacity" and "individual capacity." See McCarthy v. Azure, 22 F.3d 351, 359 n.12 (1st Cir. 1994).
² In any scenario, the Commission will, of course, remain free to exercise its prosecutorial discretion not to pursue a respondent. For example, the Commission, in some cases, may decide not to pursue a predecessor treasurer who technically has personal liability where the committee, through its current treasurer, has agreed to pay a sufficient civil penalty and to cease and desist from further violations of the Act.
person to provide notice to and/or to attach liability to, the Commission may find itself at a
significant disadvantage in protecting the public interest and in ensuring compliance with the
laws it is responsible for enforcing. By virtue of their authority to disburse funds and file
disclosure reports and to amend those reports, treasurers of committees are in the best
position to carry out the requirements of a conciliation agreement such as paying a civil
penalty, refunding or disgorging contributions, and amending reports.

The Act designates treasurers to play a unique role in a political committee; indeed,
a treasurer is the only office a political committee is required to fill. 2 U.S.C. § 432(a).
Without a treasurer, committees cannot undertake the host of activities necessary to carry out
their mission, including receiving and disbursing funds and publicly disclosing their finances
in periodic reports filed with the Commission. Id.; 2 U.S.C. § 434(a)(1). Given this statutory
role, especially the authority to receive and disburse funds (e.g., pay a civil penalty, refund
improper contributions, disgorge ill-gotten funds) on behalf of the committee, designating the
treasurer as the representative of the committee for purposes of compliance with the Act
makes sense.

Although the Commission may be entitled to take action as to a treasurer in both an
official and individual capacity, in the typical enforcement matter the Commission expects
that it will proceed against treasurers only in their official capacities. However, the
Commission will consider treasurers parties to enforcement proceedings in their personal
capacities where information indicates that the treasurer knowingly and willfully violated an
obligation that the Act or regulations specifically impose on treasurers or where the treasurer
recklessly failed to fulfill the duties imposed by law, or where the treasurer has intentionally
deprived himself or herself of the operative facts giving rise to the violation. In these
circumstances, the Commission may decide to find reason to believe the treasurer has
violated the Act in his or her personal capacity, as well as finding reason to believe the
committee violated the Act.

This statement of policy is intended to provide clearer notice to respondents and the
public as to the nature of the Commission’s enforcement actions, improve the perception of
fairness throughout the regulated community, and merge the Commission’s treasurer
designation into conceptually familiar legal principles for the federal judiciary. The
statement first surveys the law on the official/personal capacity distinction; next, addresses
when the Commission will proceed as to treasurers in their official or personal capacity or
both; and finally, resolves the reoccurring issues of successor treasurers and substitution.

The Commission’s Proposed Statement of Policy RegardingNaming of Treasurers in
Enforcement Matters was published in the January 28, 2004 Federal Register. 69 Federal
Register 4092 (January 28, 2004). One comment was received. The commenter stated that
the Commission’s effort to clarify its treasurer naming policy is welcome, but he made
several recommendations for how the Commission could assist treasurers to better
understand their potential personal liability, such as requiring separate notices in instances
where a treasurer was named in his or her individual and official capacities, and by enacting
the policy’s proposals through a rulemaking, rather than a policy statement. The
commenter’s suggestions were considered, but in order to allow the Commission to retain

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3 As discussed infra Part II., the phrases “official capacity” and “personal capacity” are legal
terms of art that permeate such fields as sovereign immunity, bankruptcy, corporations, and
federal procedure. Their usage instantaneously identifies for the judiciary when the
Commission is pursuing treasurers by virtue of their position, rather than by product of their
actions.
flexibility in processing its cases, and because the policy statement combined with existing
laws and Commission regulations provide sufficient notice to treasurers of their
responsibilities, the suggested changes were not implemented.

II. The Official/Personal Capacity Distinction

In the seminal case of Kentucky v. Graham, 473 U.S. 159 (1985), the United States Supreme Court discussed the distinction between official capacity and personal capacity suits. The Court determined that a suit against an officer in her official capacity “generally represent[s] only another way of pleading an action against an entity of which an officer is an agent.” Id. at 165. In other words, an official capacity proceeding “is not a suit against the official but rather is a suit against the official’s office.” Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 (1989). Accordingly, “an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.” Graham, 473 U.S. at 166. Therefore, in an official capacity suit, the plaintiff seeks a remedy from the entity, not the particular officer personally.

A “personal-capacity action is . . . against the individual defendant, rather than . . . the entity that employs him.” Id. at 167–68. Since a “[p]ersonal-capacity suit[ ] seek[s] to impose personal liability upon” a particular individual, the individual is the true party in interest. Id. Liability lies with the particular officer personally, not with the officer’s position. See id. at 166 n.11 (“Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent’s estate.”); see also Hafer v. Melo, 502 U.S. 21, 27 (1991) (“officers sued in their personal capacity come to court as individuals”).
The “distinction between claims aimed at a defendant in his individual as opposed to representative capacity can be found across the law.” McCarthy, 22 F.3d at 360 (citing numerous Supreme Court, lower court, and state cases referencing differences between individual and official capacity claims in multiple fields of law). The official capacity/individual capacity distinction also carries societal significance. As the McCarthy court explained:

The ubiquity of the [official capacity/individual capacity] distinction is a reflection of the reality that individuals in our complex society frequently act on behalf of other parties—a reality that often makes it unfair to credit or blame the actor, individually, for such acts. At the same time, the law strikes a wise balance by refusing automatically to saddle a principal with total responsibility for a representative’s conduct, come what may, and by declining mechanically to limit an injured party’s recourse to the principal alone, regardless of the circumstances.

Id.

III. Treasurers in Their Official Capacity

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Clearly indicating that the current treasurer is a party to an enforcement proceeding in his or her official capacity will improve the Commission’s enforcement of the law in a number of ways. Most importantly, it clarifies that findings by the Commission (whether “Reason To Believe” or “Probable Cause To Believe”) or the signing of a conciliation agreement only concerns the treasurer in his or her capacity as representative of the committee, not personally. The practice also ensures that a named individual who signs the conciliation agreement on behalf of the committee (or obtains legal representation on behalf of the committee) is the one empowered by law to disburse committee funds to pay a civil penalty, disgorge funds, make refunds, and carry out other monetary remedies that the committee agrees to through the conciliation agreement.5 Also, naming a treasurer (in his or her official capacity), as opposed to naming simply the office of treasurer or just the committee, not only provides the Commission with an individual in every instance to serve with notices throughout the proceeding, but also results in more accountability on behalf of the committee – that is, a particular person who will ensure that a committee is responsive to Commission findings.6 Finally, specifying whether a treasurer is a party to an enforcement proceeding in his or her official or personal capacity is consistent with use of these terms as pleading conventions in court actions. A probable cause finding against a treasurer in his or her official capacity makes clear to a district court in enforcement litigation that the

5 In the absence of a treasurer, “the financial machinery of the campaign grinds to a halt . . . .” FEC v. Toledano, 317 F.3d 939, 947 (9th Cir. 2003), reh’g denied; see 2 U.S.C. 432(a) (“No expenditure shall be made . . . without the authorization of the treasurer or his or her designated agent.”); 11 CFR 102.7(a) (designation of assistant treasurer).

6 Such accountability may be especially helpful in matters involving committees that tend to be ephemeral – existing for only a short time before permanently disbanding operations.
Commission is seeking relief against the committee, and would only entitle the Commission to obtain a civil penalty from the committee. See Graham, 473 U.S. at 165.

IV. Treasurers in Their Personal Capacities

The Act places certain legal obligations on committee treasurers, the violation of which makes them personally liable. See, e.g., 2 U.S.C. 432(c) (keep an account of various committee records), 432(d) (preserve records for three years), 434(a)(1) (file and sign reports of receipts and disbursements). The Commission’s regulations further require treasurers to examine and investigate contributions for evidence of illegality. See 11 CFR 103.3. Due to their “pivotal role,” treasurers may be held personally liable for failing to fulfill their responsibilities under the Act and the Commission’s regulations. See Toledano, 317 F.3d at 947 (“The Act requires every political committee to have a treasurer, 2 U.S.C. 432(a), and holds him personally responsible for the committee’s recordkeeping and reporting duties, id. 432(c)-(d), 434(a) . . . . Federal law makes the treasurer responsible for detecting [facial contribution] illegalities, 11 CFR 103.3(b), and holds him personally liable if he fails to fulfill his responsibilities, see 2 U.S.C. 437g(d) . . . .”) (emphasis added); see also FPC v. John A. Dramesi for Cong. Comm., 640 F. Supp. 985 (D.N.J. 1986) (holding treasurer responsible for failing to “make . . . best efforts to determine the legality of” an excessive

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7 If a past or present treasurer violates a prohibition that applies generally to individuals, the treasurer may be named as a respondent in his or her personal capacity, and findings may be made against the treasurer in that capacity. In this way, a treasurer would be treated no differently than any other individual who violates a provision of the Act. The Act and the Commission’s regulations apply to any “person,” which includes individuals. See, e.g., 2 U.S.C. 432(b) (forward contributions to the committee’s treasurer), 441e (receipt of contributions from foreign nationals), and 441f (making and knowingly accepting contributions in the name of another).
contribution); FEC v. Gus Savage for Cong. '82 Comm., 606 F. Supp. 541, 547 (N.D. Ill. 1985) ("It is the treasurer, and not the candidate, who becomes the named defendant in federal court, and subjected to the imposition of penalties ranging from substantial fines to imprisonment."); 104.14(d) ("Each treasurer of a political committee, and any other person required to file any report or statement under these regulations and under the Act shall be personally responsible for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it.") (emphasis added).

Thus, a treasurer may be named as a respondent in a Matter Under Review in his or her personal capacity, and findings may be made against a treasurer in the same capacity, when the MUR involves the treasurer's violation of a legal obligation that the statute or regulations impose specifically on committee treasurers or when a reasonable inference from the alleged violation is that the treasurer knew, or should have known, about the facts constituting a violation. In practice, however, the Commission intends to consider a treasurer the subject of an enforcement proceeding in his or her personal capacity only when available information (or inferences fairly derived therefrom) indicates that the treasurer had knowledge that his or her conduct violated a duty imposed by law, or where the treasurer reckless failed to fulfill his or her duties under the act and regulations, or intentionally deprived himself or herself of facts giving rise to the violations. If, at any time in the

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8 Indeed, if FECA were construed to impose liability on treasurers only in their official capacities, it would effectively mean that only committees are liable for violations under the statute – which would have been easy enough for Congress to accomplish by writing the Act to impose reporting, recordkeeping, and other duties on "committees" rather than "treasurers." In fact, in some instances, the Act and the Commission's regulations specifically impose obligations on committees and committee officers and candidates. See, e.g., 2 U.S.C. 441a(f) (receipt of excessive contributions), 11 C.F.R. 104.7(b) (best efforts).
proceeding, the Commission is persuaded that the treasurer did not act with the requisite state
of mind, subsequent findings against the treasurer will only be made in his or her official
capacity.9

Should the Commission file suit in district court following a finding of probable cause
against a treasurer in his or her personal capacity, judicial relief, including an injunction and
payment of a civil penalty, could be obtained against the treasurer personally. Graham, 473
U.S. at 166-168. Likewise, when the Commission obtains relief from a treasurer personally,
the obligation will follow the individual. Thus, when a treasurer in his or her personal
capacity agrees to pay a civil penalty through a conciliation agreement, or is ordered to pay a
civil penalty by a district court, a personal obligation exists to pay the civil penalty. (A
separate civil penalty would likely be assessed against the committee itself.) Likewise, a
cease and desist provision (negotiated through conciliation) or an injunction (imposed by a
district court) against a treasurer in his or her personal capacity will still apply to that
treasurer in the event he or she subsequently becomes treasurer with another committee. Cf.
Sec’y Exch. Comm’n v. Coffey, 493 F.2d 1304, 1311 n.11 (6th Cir. 1974) (“The significance
of naming an officer . . . personally is that ‘otherwise he is bound only as long as he remains
an officer . . . , whereas if he is named [personally] he is personally enjoined without limit of
time.’”) (quoting 6 L. Loss, Securities Regulation 4113 (1969, supp. to 2d ed.)).

9 Conversely, when a reason-to-believe finding is made against a treasurer in his or her
official capacity only, but the potential violations at issue involve obligations specifically
imposed by the Act or regulations on treasurers, the notice of the finding will be accompanied
by a letter advising that the Commission could later decide to pursue the treasurer in a
personal capacity if information shows that the treasurer knowingly and willfully violated the
Act, or recklessly failed to fulfill the duties imposed by law, or intentionally deprived himself
or herself of the operative facts giving rise to the violation.
V. Treasurers in Both Capacities

There will likely be cases in which the treasurer is subject to Commission action in both his or her official and personal capacity, as explained in supra sections III. and IV. In such cases, the Commission will clearly designate that the findings are being made against the treasurer in both capacities. See, e.g., United States v. Johnson, 541 F.2d 710, 711 (8th Cir. 1976) (applying a similar standard in an action involving the Federal Trade Commission when finding that “[t]he propriety of including a person both as an individual and as a corporate officer in a cease and desist order has consistently been upheld in instances where the person included was instrumental in formulating, directing and controlling the acts and practices of the corporation”) (citing Fed. Trade Comm’n v. Standard Ed. Soc’y, 302 U.S. 112 (1937); Standard Distrib. v. Fed. Trade Comm’n, 211 F.2d 7 (2d Cir. 1954); Benrus Watch Co. v. Fed. Trade Comm’n, 352 F.2d 313 (8th Cir. 1965)).

For example, if a complaint alleges a violation such as coordination or receipt of contributions in the name of another, the Commission intends initially to name the treasurer as a respondent only in his or her official capacity. Notably, in these cases the reporting violation stems from the same operative facts as the principal violation. Only if the Commission learns later that the treasurer had knowledge of the operative facts -- for example, the treasurer knew that an in-kind contribution stemming from coordination went unreported – or acted recklessly, or intentionally deprived himself or herself of the relevant facts, might the Commission make findings against the treasurer in his or her personal capacity.
In cases where the treasurer is subject to Commission action in both official and personal capacities, the respondents could be named as “John Doe for Congress and Joe Smith, in his official capacity as treasurer and in his personal capacity.” Alternatively, the respondents could be named as “John Doe for Congress and Joe Smith, in his official capacity as treasurer” and “Joe Smith, in his personal capacity.” Regardless of the form of the notification, where a treasurer has been named in both his or her official and personal capacities, any resulting conciliation agreement would be signed by the treasurer on behalf of both the committee and the treasurer in his or her personal capacity.

VI. Successor Treasurers/Substitution

An issue closely related to the official/personal capacity distinction is whether a successor treasurer may be substituted for a predecessor treasurer in a matter under review. Often the specific individual who was the treasurer at the time of a violation is no longer the treasurer during the enforcement process. Whether the successor treasurer or the predecessor treasurer should be named as the respondent depends on whether the Commission is pursuing the treasurer in his or her official capacity, personal capacity, or both.

Currently, when OGC discovers that a committee has changed treasurers after the date of the activity on which the finding was based, OGC typically notes the change of treasurer, the date of the change, the former treasurer’s name, and indicates whether an amendment was made to the Statement of Organization in OGC’s next report to the Commission. If a treasurer change is made after a finding of probable cause to believe, then OGC typically includes the new treasurer and notes the change in its next report on the matter. If a treasurer change is made after a finding of probable cause to believe, OGC sends the new treasurer a
supplemental probable cause brief (incorporating the prior probable cause brief), which states that the Commission found probable cause to believe against the committee and the treasurer’s predecessor and will recommend probable cause against the new treasurer. After receiving a response or waiting until the expiration of the response period, OGC typically returns to the Commission with a recommendation as to the new treasurer.

When the Commission pursues a current treasurer in his or her official capacity, successor treasurers will be substituted for the predecessor treasurer. In such cases, the Commission is pursuing the official position (and, therefore, the entity), not the individual holding the position. See Will, 491 U.S. at 71. Because an official capacity action is an action against the treasurer’s position, the Commission may summarily substitute a new treasurer in his or her official capacity at any stage prior to a finding of probable cause to believe.¹⁰

When a predecessor treasurer may personally liable, the Commission could pursue the predecessor treasurer individually, and not substitute the successor treasurer for the predecessor treasurer individually. See fn. 7; Graham, 473 U.S. at 167–68. There would be no legal basis for imputing personal liability from a predecessor treasurer’s misconduct to a successor treasurer who did not personally engage in the misconduct.

If the Commission were to pursue a treasurer both officially and personally and this treasurer is later replaced, the Commission could pursue the predecessor treasurer for any

¹⁰ Pursuant to the final policy, the Commission is not legally obligated to undertake the requirements of 2 U.S.C. 437g(a)(3) when a successor treasurer begins his or her position; although not legally required to do so, the Commission would intend to inform a new treasurer of the pending action and make copies of the briefs available to the successor treasurer.
violations for which he or she is personally liable, and substitute the successor treasurer for
official capacity violations. Absent some independent basis of liability, the Commission does
not intend to pursue intermediate treasurers.\textsuperscript{11} See \textit{Cal. Democratic Party v. FEC}, 13
F. Supp. 2d 1031, 1037 (E.D. Cal. 1998) (dismissing individual capacity claims against a
former treasurer because “there is no allegation that [the treasurer] violated any personal
obligation” and dismissing official capacity claims against him “since [he] is no longer
treasurer . . . and thus, is not the appropriate person against whom an official capacity suit can
be maintained . . .”).\textsuperscript{12}

VII. Final Statement of Policy

In light of the considerations explained above and after carefully reviewing the
comment submitted on this matter, the Commission hereby announces that, from the date of

\textsuperscript{11} For example, while Treasurer A is the treasurer for Joe Smith for Congress, a violation
occurs that subjects A to official liability and potentially to individual liability. Treasurer A
would be named in his official capacity and notified in a reason-to-believe notification of the
potential for personal liability. After the enforcement action has begun, Treasurer A resigns
and Treasurer B takes over. The Commission would pursue Treasurer B in her official
capacity, and if the circumstances warranted, Treasurer A in his individual capacity. If
Treasurer B resigns and is succeeded by Treasurer C prior to the conclusion of the
enforcement matter, the Commission would then continue to pursue Treasurer A in his
individual capacity and pursue Treasurer C in her official capacity. Treasurer B would no
longer be named in her official capacity.

\textsuperscript{12} A deeper examination of the court file indicates that—despite the \textit{California Democratic
Party} court’s assertion to the contrary—the Commission never actually pled that the treasurer
in this case was personally liable. Rather, the complaint references the treasurer “as
treasurer” and the Commission’s response to the treasurer’s motion to dismiss indicates that
the Commission was pursuing the treasurer “in his official capacity.” Compl., paragraphs 8,
58–59, Prayer paragraphs 1–5; Resp. to Def. Mot. to Dismiss, p. 21. However, the court’s
statement in \textit{California Democratic Party} underscores the need for the Commission to
delineate more clearly the capacity in which it pursues treasurers.
publication of this notice, it intends to exercise its discretion in enforcement matters by
naming treasurers as follows:

1. In enforcement actions where a political committee is a respondent, the
   Commission will name as respondents the committee and its current treasurer
   “in (his or her) official capacity as treasurer.”

2. In enforcement actions where information indicates that treasurer may have
   violated a provision of the Act or regulations that applies specifically to
   treasurers, or a provision that applies generally to individuals, the Commission
   may consider the treasurer a subject to the action “in (his or her) personal
   capacity.”

Bradley A. Smith
Chairman
Federal Election Commission

DATED: ____________________
BILLING CODE: 6715-01-U